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Supreme Court of the United States

October Term, 1961

No. 513

JOHN F. McNEIL, Superintendent of Matteawan State Hospital,

Appellant,

—v.—

JOHN J. CARROLL,

Appellee.

MOTION TO DISMISS OR AFFIRM

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INDEX

PAGE

Statement of Facts 1

Argument:

The Case Having Been Correctly Decided Below, it Merits No Further Review in This Court 3

A. The Statute Is Not a Product of Medical Enlightenment 3

B. The Availability of Habeas Corpus or Other Post-Confinement Remedies Do Not Repair the Injury Suffered by Transfer Under § 412 . 5

C. The Court Below Correctly Applied the Equal Protection Clause 6

D. Appellee's Transfer Inflicted Concrete and Substantial Injury Upon Him 7

E. The Holding Below That § 412 Offends the Equal Protection Clause Does Not Vitiate Appellee's Other Arguments 8

1. Section 412 Deprived Appellee of Procedural Due Process 10

2. Section 412 is Unconstitutionally Vague .. 10

Conclusion 13

Appendix 1a

Cases

Ashwander v. T. V. A., 297 U. S. 288 (1936) 9

Board of Public Welfare v. Myers, 224 Md. 246 (1961) 5

Brown v. Board of Education, 347 U. S. 483 (1959) . 6

Buck v. Bell, 274 U. S. 200 (1927) 9, 10

Cline v. Frick Dairy Co., 274 U. S. 445 (1927) 10

Fox v. Washington, 236 U. S. 273 (1915) 12

Greene v. McElroy, 360 U. S. 474 (1958) 10

PAGE

Hillburn v. St. Paul, M. & M. Ry. Co., 23 Mont. 229, 58 Pac. 551 (1889) 11
Parker v. Lester, 227 F. 2d 708 (9th Cir. 1955) 10
People ex rel. Brown v. Johnston, 9 N. Y. 2d 482 (1961) 4
People ex rel. Monaco v. McNeil, 299 N. Y. 605 (1945) 4, 12
Roth v. U. S., 354 U. S. 476 (1957) 11
A. B. Small Co. v. American Sugar Refining Co., 267 U. S. 233 ..... 10, 11
Standard Chemicals & M. Corp. v. Waugh Chemical Corp., 231 N. Y. 851, 131 N. E. 566 (1921) 11
State ex rel. Hastin v. State Board of Canvassers, 159 Wisc. 216, 150 N. W. 542 (1915) 11
U. S. v. Carolene Products, 304 U. S. 144 7
Utah Power & Light Co. v. Pfost, 286 U. S. 165 (1932) 12
Western Lumber & Pole Co. v. City of Ogden, 23 Colo. App. 461, 130 Pac. 1027 (1913) 11

Constitution and Statutes

U. S. Constitution, Amendment 14 8
N. Y. Civil Practice Act, Art. 78 5
N. Y. Code of Criminal Procedure, § 870-875 ..... 1a
N. Y. Code of Criminal Procedure, § 662b 1a
N. Y. Correction Law, § 400 4
N. Y. Correction Law, § 408 ..... 2a
N. Y. Correction Law, § 412 ..... 2, 3, 4, 5, 6, 8, 9, 10
N. Y. Insanity Law, § 122 (2 N. Y. State Consolidated Laws, 1909) 3
N. Y. Mental Hygiene Law, § 85 ..... 6, 10

Texts

Carroll, Alice in Wonderland (N. Y. 1944) 5
Report of the American Bar Foundation on the Rights of the Mentally Ill, 1961 ..... 1a

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No. 513

JOHN F. MCNEIL, Superintendent of Matteawan State Hospital,

Appellant.

—v.—

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Appellee.

MOTION TO DISMISS OR AFFIRM

Statement of Facts[1]

Appellee, pursuant to an order entered under § 74 of the New York State Mental Hygiene Law on January 4, 1949, was certified as mentally ill and confined at Pilgrim State Hospital (R. 108-117). On December 21, 1949, appellee eloped from the hospital while still subject to the order of commitment (R. 133). On September 23, 1950, appellee was returned to the custody of the Department of Mental Hygiene and on September 25, 1950, he was received at Pilgrim State Hospital (R. 133).

On December 22, 1949, the day following appellee's elopement from Pilgrim State, the hospital's Director requested in writing that the Commissioner of the Department of Mental Hygiene order appellee, upon re-apprehension,

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[1] "R" refers to the record on appeal in the court below. The opinion of the Court of Appeals for the Second Circuit is now reported at 294 F. 2d 117.

to be transferred to Matteawan State Hospital under the purported authority of Section 412 of the New York State Correction Law. Section 412 was invoked on the ground that an assault was allegedly committed upon a hospital attendant by the appellee immediately preceding his elopement (R. 138). The record is barren of any evidence relating to the alleged assault. In conjunction with the fact that he had served a term of imprisonment under a 1934 felony conviction (R. 122), his sole conviction, the Commissioner of Mental Hygiene, on January 4, 1950, granted the Director's request and ordered appellee's prospective transfer to Matteawan (R. 107).

On September 26, 1950, the day following his return to Pilgrim State, appellee was transferred to Matteawan (R. 134). He was continuously confined at Matteawan until October 1961 when he was re-transferred to Pilgrim State pursuant to the mandate of the court below, after denial of an application for a stay by appellant.

As shown by the following excerpts from his medical record, appellee has consistently denied commission of the assault which was the basis of his transfer to Matteawan.

(a) September 26, 1950 (R. 152).

> "Q. This employee you had the battle with, was he doing something to you? A. I was the best friend he had, used to bring him up things—he used to kick the poor patients, beat them up. He tried it with me and I didn't like it."

(b) October 24, 1950 (R. 155).

> "He denies any connection with the assault on an attendant at Pilgrim State Hospital. He admits eloping. He says he got the keys from a patient and he says he locked the door so no one else would escape after he left."

(c) March 7, 1951 (R. 158).

"Denies that he injured anyone in any other hospital."

(d) November 14, 1951 (R. 158).

"He denies absolutely that he made any attack on an attendant by the name of Weeks and he claims that this Weeks was a friend of his."

(e) April 6, 1953 (R. 164).

"* * *[H]e claims he was the one who was assaulted."

ARGUMENT

The Case Having Been Correctly Decided Below, it Merits No Further Review in This Court.

A. The Statute Is Not a Product of Medical Enlightenment.

Appellant's jurisdictional statement presents for the first time the novel argument that Section 412 is a product of enlightened treatment of the mentally ill. Although there have been several insignificant changes through various codifications, Section 412 is fundamentally the same as when it was first enacted in 1893.[2] It is one thing to say that the transfer of a patient within a hospital is a medical decision; it is another to say that the transfer from a hospital to a prison, is a medical decision. It is hardly a sign of enlightenment for a hospital director to be able, by a stroke of the pen, and without any check against error, bias or misjudgment, to cause a civil mental patient to be abruptly thrown in among insane criminals.

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[2] See, *e.g.*, § 122 of Insanity Law, in 2 N. Y. State Consolidated Laws 1909, where virtually the identical statutory language is included under Article 4 entitled "Matteawan State Hospital for Insane Criminals."

It may well be enlightened practice to transfer a sick criminal prisoner from his prison cell to a prison hospital. And one would not quarrel, to use the terms of appellant's analogy, with a medical decision to move the prisoner-patient from the neurology ward to the orthopedic ward of the prison hospital to which he has been transferred. But there is a substantial and qualitative difference between an intra-mural transfer and an order transferring a patient in a civil hospital to a correctional institution as provided by Section 412.[3] It might even be argued that a transfer to Matteawan of a convicted criminal who becomes mentally ill while serving in a state penitentiary is an expression of enlightenment, but see *People ex rel. Brown* v. *Johnston*, 9 N. Y. 2d 482 (1961), *infra*, note 4. However, the notion that a mentally ill person may be thrown in with convicted criminals is in fact reminiscent of precisely those "ancient notions of mental illness" which, appellant argues, New York has abandoned by this statute.[4] (Appellant's ref-

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[3] Matteawan is under "the jurisdiction and control" of the Department of Correction. N. Y. Correction Law § 400.

[4] *People ex rel. Monaco* v. *McNeil*, 299 N. Y. 605 (1945), although cited by appellant as authority for the statute's constitutionality, can be given no weight at all in light of its analysis and express rejection by the court below in footnote 6 of its opinion. Furthermore, the recent New York Court of Appeals decision in *People ex rel. Brown* v. *Johnston*, 9 N. Y. 2d 482 (1961), casts considerable doubt on the constitutionality of any kind of free-wheeling administrative shuffling of institutional inmates as if they were just so many units of fungible goods. As the New York Court of Appeals held:

> "* * * [I]t seems obvious that any *further* restrant *in excess* of that permitted by the judgment or constitutional guarantees should be subject to inquiry. An individual, once validly committed and placed under the jurisdiction of the Department of Correction * * * is not to be divested of all rights and unalterably abandoned and forgotten by the remainder of society." (Italics in original) At 485.

erence, at p. 8 of his jurisdictional statement, to the many States which permit transfers between hospitals without hearing is analyzed in the appendix to this motion.)

B. The Availability of Habeas Corpus or Other Post-Confinement Remedies Do Not Repair the Injury Suffered by Transfer Under § 412.

In two instances on page 9 of his jurisdictional statement, appellant gives an incomplete picture of the opinion below. First, there is attributed to the court below the observation that New York is not constitutionally required to give a hearing to mental patients without a criminal record before transferring them to Matteawan. This, of course, is the observation of the Attorney General of the State of New York, not that of the Second Circuit Court of Appeals. Second, it is stated that the court below "fails to note" that appellee was not deprived of resort to the courts. This is a disingenuous argument. It implies that there is no defect in a state procedure which arbitrarily confines an individual and deprives him of any quantum of liberty,[5] so long as the individual may subsequently challenge the confinement's legality by habeas corpus, or a review proceeding under Article 78 of the New York Civil Practice Act. But this stands on its head the entire tradition of our jurisprudence which requires that a person have his day in court *first*.[6]

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[5] For further judicial gloss on the retained constitutional rights of persons incarcerated in state institutions, see *Board of Public Welfare* v. *Myers*, 224 Md. 246 (1961). The Supreme Court of Maryland held there that racial segregation of inmates of state training schools for delinquint minors violated the equal protection clause.

[6] "Let the jury consider their verdict", the King said * * *. "No, no", said the Queen. "Sentence first, verdict afterwards." Lewis Carroll, "Alice in Wonderland", contained in *The Lewis Carroll Book* (New York 1944), p. 109.

To transport an individual to a correctional institution where, as the District Court found, his freedom is "considerably curtailed," and to inform him that he may seek his freedom by habeas corpus (information of questionable value to an unschooled and indigent inmate) is not, as appellant claims, "the substantial equivalent" of proceeding under New York Mental Hygiene Law § 85. In the course of a Section 85 hearing it may very well have been proven that appellee did not in fact attack an attendant, as is claimed, and he would not then have been transferred to Matteawan. It is conceivable, of course, that appellee, after having been summarily transferred to Matteawan under Section 412, could, on habeas corpus, likewise persuade the Court of his innocence. But until he learned that habeas corpus was available, learned how to prepare a petition, learned how to file it, and finally was granted a hearing, he will have passed considerable time in the correctional institution where he should never have been in the first place.

C. The Court Below Correctly Applied the Equal Protection Clause.

Appellant cites the school segregation cases, *Brown* v. *Board of Education*, 347 U. S. 483, presumably to argue that the court below misapplied the equal protection clause. Appellant's argument seems to imply that there is no factual differentiation between Matteawan and Pilgrim State and therefore the Court could only have found that the equal protection clause was violated because of some inherent or *per se* differentiation. But this argument fails because the inequality in the case at bar is in fact established both from the evidence before the District Court, and the statute-directed differentiation spelled out by the opinion below.

Appellant's attack on the equal protection front has another fatal weakness. Every decision of this Court cited by appellant in that portion of Part (A) of its jurisdic-

tional statement which is addressed to the equal protection clause, involved one or another economic regulatory statute. But there is a well-established distinction, in the most profound constitutional sense, between the legislature's right to experiment rather broadly with economic regulations, and the severe limitations on its power to regulate personal liberties. *U. S.* v. *Carolene Products*, 304 U. S. 144, 152, n. 4.

D. Appellee's Transfer Inflicted Concrete and Substantial Injury Upon Him.

Section (B) of the jurisdictional statement asserts that appellee suffered no harm by being transferred to Matteawan and, therefore, there was no basis for applying the equal protection clause. To support this assertion, appellant says that at most, the District Court found only that appellee would be subject to greater surveillance at Matteawan. In fact, the District Court found:

> "At Matteawan State Hospital the freedom of the patient is considerably curtailed. The patient is confined to the building or exercise yard; visiting hours are fewer; his correspondence to and from the hospital is examined and outgoing communications, other than to his attorney, are limited to one each week. Surveillance is continuous and effected by the presence of relatively numerous attendants—one to three patients. No patient is allowed out overnight or for weekends as they may be in the other State Mental Hospitals".[7]

In addition, the Second Circuit did not reason that *any* difference in treatment between two classes *per se* implies some injury, for it did not fail to show that respondent would be harmed by the application of § 412. Indeed, appellant's position is completely refuted in the following passage of the opinion below:

> "The conclusion is inescapable when one reads New York Correction Law §§ 400-414 in connection with New York Mental Hygiene Law § 85 that the State

[7] Jurisdictional Statement, p. 18.

> of New York has set Matteawan apart from the state mental hospitals administered by the Department of Mental Hygiene and that the distinctive purpose of Matteawan is to provide a maximum security institution to care for insane criminals and other mentally ill persons who are so dangerously insane that they pose a threat to the therapeutic community at the ordinary state mental hospitals".[8]

Thus the Court found from the face of the statutes, that there were substantial differences, as a matter of law, between the way New York accommodated civil mental patients on the one hand, and insane criminals on the other. In this connection, it is significant also that appellee's attempts to introduce testimony for the purpose of demonstrating factual differences in the quality of medical treatment were thwarted by the District Court.[9]

E. The Holding Below That § 412 Offends the Equal Protection Clause Does Not Vitiate Appellee's Other Arguments.

Part C of appellant's jurisdictional statement implies that although the Court of Appeals might have made an improper ruling in appellee's favor in holding that the New York statute offends the equal protection clause, the Court nevertheless agreed with appellant that the other constitutional arguments raised below were of little moment. Appellee urged below, and urges again in this Court, that in addition to violating the equal protection clause, Section 412 of the New York Correction Law violates the 14th Amendment by depriving appellee of procedural due process and is so vague and uncertain that it further violates the due process clause.

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[8] Jurisdictional Statement, p. 28.

[9] Transcript of hearing on District Court, pp. 25-26 (included in record on appeal.)

The Court of Appeals held the statute unconstitutional as a violation of the equal protection clause without discussing the other urged bases of constitutional infirmity. It can hardly be questioned that a holding of unconstitutionality on one ground, where several grounds are urged, does not create even the barest presumption that the Court found the other grounds untenable. Questions of constitutional law are not to be anticipated in advance of the necessity of deciding them, and no constitutional determination is properly made by a Court unless absolutely necessary to a decision of the case before it. See *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 346-347 (1936) (Brandeis, J., concurring opinion). Consequently, neither the opinion below, nor settled principles of constitutional law, offer any support to what is apparently the point of appellant's argument.

Appellant resorts to Mr. Justice Holmes' observation in *Buck* v. *Bell*, 274 U. S. 200, 208 (1927), that the equal protection clause "is the usual last resort of constitutional arguments * * *." By this, appellant apparently intends to dispose of the other arguments advanced by appellee below. But the equal protection argument was not a "last resort" by appellee and certainly not by the Court, which ruled the statute unconstitutional on grounds of equal protection without discussing any of the other grounds of unconstitutionality. In *Buck* v. *Bell*, *supra*, this Court held constitutional a Virginia statute authorizing compulsory sterilization of third generation imbeciles. Pointing out that there was an elaborate and careful statutory scheme providing for notice, hearing, counsel, judicial review and all of the incidents of due process—all of which are absent from § 412—Mr. Justice Holmes used the phrase quoted above to reject the argument that the Virginia statute violated the equal protection clause inasmuch as the sterilization would be applied only to imprisoned imbeciles—but not to imbeciles at large. Of course, appel-

lee's status and his argument is completely different. Applying the facts of this case to *Buck* v. *Bell*, there is no doubt but that this Court would have ruled otherwise if the Virginia statute provided that the procedure for notice, hearing and judicial review was totally eliminated for all imbeciles with any prior criminal record—that for ex-convict imbeciles, summary sterilization without hearing was constitutionally permissible.

1. *Section 412 Deprived Appellee of Procedural Due Process.*

Section 85 provides at least the minimum procedural safeguards which a prospective transferee must be accorded. He is granted a hearing before an impartial tribune, the right to counsel, the right to be heard, and the right to confront and cross-examine the witnesses against him.[10] These safeguards are entirely ignored by Section 412, allowing appellee to be transferred by administrative order on the basis of a charge he was not permitted to meet.

2. *Section 412 is Unconstitutionally Vague.*

The statement in appellant's jurisdictional statement, page 16, that the "vagueness" doctrine is confined to *criminal* liability is incorrect. This Court has expressly held to the contrary. *Cline* v. *Frick Dairy Company*, 274 U. S. 445, 463 (1927); *A. B. Small Company* v. *American Sugar Refining Company*, 267 U. S. 233, 239:

> "* * * [N]ot the criminal penalty * * * but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle. * * *"

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[10] Cf. *Greene* v. *McElroy*, 360 U. S. 474, and *Parker* v. *Lester*, 227 F. 2d 708 (9th Cir. 1955).

The vagueness doctrine is regularly applied by highest state courts in considering the constitutionality of statutory prohibitions and liabilities which are not criminal.[11] Chief Judge Cardozo, in *Standard Chemicals & M. Corp.* v. *Waugh Chemical Corp.*, 231 N. Y. 351, 131 N. E. 566 (1921), cited with approval by this Court in *A. B. Small Co.* v. *American Sugar Refining Co., supra*, said, in response to this very same argument:

> "* * * [I]t applies, and with like consequences, to civil suits as well. The prohibition was declared a nullity because too vague to be intelligible. No standard of duty had been established. * * * [I]ts consequences are not limited to criminal prosecutions. A prohibition so indefinite as to be unintelligible is not a prohibition by which conduct can be governed. It is not a rule at all; it is merely exhortation and entreaty. The act * * * sets the individual adrift upon the uncharted sea of subjective prejudice and favor. The arbitrium boni vivi, unrestrained and undirected, becomes the test of right and wrong. * * * Disobedience is impossible unless there is something to be obeyed."

Further, *Roth* v. *U. S.*, 354 U. S. 476, 491 (1957) does indeed state, as appellant asserts, that the difficulty of deciding marginal cases does not render a statute void for vagueness, but appellant omits to mention what is probably the most significant feature of the *Roth* case: in order to find constitutional the obscenity statutes there under attack, this Court found that, in fact, the courts below had utilized a certain and objective standard to define "obscene," an element entirely absent in this case. Certainly, a statute should be read so as to save its constitutionality and, as the court below states in is opinion, it affirmatively

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[11] See *Hillburn* v. *St. Paul, M. & M. Ry. Co.*, 23 Mont. 229, 58 Pac. 551 (1899) (School tax statute); *State ex rel. Hustin* v. *State Board of Canvassers*, 159 Wisc. 216, 150 N. W. 542 (1915) (Election law); *Western Lumber & Pole Co.* v. *City of Ogden*, 23 Colo. App. 461, 130 Pac. 1027 (1913) (Mechanic's lien Act).

attempted to give the statute a reading consistent with constitutionality, but found itself unable to do so by its "plain language."[12]

Appellant claims finally that no finding of unconstitutionality should be made until the statute has been construed by the New York Courts. But, of course, the New York Court of Appeals did pass on § 412 in *People ex rel. Monaco* v. *McNeil, supra.* Moreover, as the court below stated:

> "In any event rights under the United States Constition are here at issue and as to them federal courts, though always instructed by the views of state courts, must discharge the final responsibility".[13]

The two cases cited by appellant on this point (p. 16) do not support its argument. In *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 186-187 (1932), the Court declined to rule on the constitutional question essentially because such a holding was unnecessary to decide the case. And in *Fox* v. *Washington*, 236 U. S. 273 (1915), rather than withhold interpretation of a statute out of deference to a state court, Mr. Justice Holmes articulated what he found to be the implied construction by the state court, and added something of his own by way of statutory construction "in accord with the usages of English". *Ibid.*

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[12] Jurisdictional Statement, p. 32.

[13] Opinion below, footnote 6.

CONCLUSION

Because no substantial questions of public importance are presented which have not been finally and correctly determined by the United States Court of Appeals, its decision holding the statute unconstitutional should be affirmed by this Court, or the appeal should be dismissed.

Respectfully submitted,

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Appendix

On page 8 of his jurisdictional statement, appellant says, "[O]f the 34 states with provisions for transferring patients from one institution to another, only one requires a hearing on a transfer from one state mental hospital to another. Lindman and McIntyre (ed.), *The Mentally Disabled and the Law*, pp. 179-82 (1961)."[1]

Appellant has been misled by the material he cites:

1. The compilation is obviously incomplete. For example, it cites neither N. Y. Mental Hygiene Law, § 85 nor N. Y. Correction Law, § 412.

2. The exclusion of § 85 and § 412, if not an inaccuracy, may indicate the study's limited scope, for it does not discuss criminal hospital facilities at all. Only nineteen states in addition to N. Y. have such special facilities:[2] Separate Ward at Colorado State Hospital. Col. Rev. Stat. § 71-2-1; Illinois Security Hospital. Ill. Ann. Stat. § 23-1441; Indiana Hospital for Insane Criminals. Ind. Stat. Ann. § 22-306; Psychiatric Ward of Men's Reformatory. Iowa Code Ann. § 226.30; Separate buildings on grounds of one state hospital. Gen. Stat. of Kans. § 76-2460;

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[1] The volume cited is *The Report of the American Bar Foundation on the Rights of the Mentally Ill*. Appellant is in fact incorrect in stating that the Report lists only one state which requires a hearing prior to transfer. Two states have such a requirement: Conn. Gen. Stat. §§-17-192. Del. Code Ann. § 16-5324; and Arizona requires the consent of the patient, his parents, spouse or guardian. Ariz. Rev. Stat. § 36-501(8) (Supp. 1961).

[2] By far the greatest number of inmates of these special institutions are those charged with crimes but unable to stand trial because of mental illness (*e.g.*, N. Y. Code of Criminal Procedure, §§ 870-875) or those acquitted at trial because of insanity but deemed to require continued custody (see, *e.g.*, N. Y. Code of Criminal Procedure § 662b). For example, in fiscal 1959, of 291 admissions to Matteawan State Hospital, 198 fell into those two groups. All but 17 of the remainder consisted of prisoners at correctional institutions who became insane during service of their sentence. Annual Report of Matteawan State Hospital, 1959.

Maximum Security Hospital. Md. Code Ann., Art. 59 § 19A (Supp. 1960); Bridgewater State Hospital. Mass. Ann. Laws §§ 123-20, 123-22A; Ionia State Hospital. Mich. Comp. Laws § 14.855; Minnesota Security Hospital. Minn. Stat. § 253.20; Trenton State Hospital. N. J. Stat. Ann. § 30:4-87; Ohio Rev. Laws Ann. § 5125.03; Fairview State Hospital. Pa. Stat. Ann. Title 50, § 1140; Criminal Insane Ward at Cranston State Hospital. Gen. Laws of R. I., § 26-4-1 (1956); Branch of state hospital located on grounds of state penitentiary. Code of Laws of S. Car. § 32-899.10 (Supp. 1960); Maximum Security Unity. Tenn. Code Ann. § 33-701 (Supp. 1960); Department for Criminal Insane. Code of Va. § 37-2; Special ward in one of the state hospitals. Wash. Rev. Code § 10-76-060; Central State Hospital. Wis. Stat. § 51.21(2); Wyo. Stat. Ann. § 25-44.

Of the nineteen states listed above, three (possibly four), in addition to N. Y. Mental Hygiene Law, § 85, require a judicial hearing to transfer a patient or inmate of a civil institution to the special facility.[3]

Iowa. Iowa Code Ann. § 226.30.

Massachusetts. Mass. Ann. Laws §§ 123-20 and 123-22A.

Michigan. Op. Att. Gen. 1930-1932, p. 396.

Pennsylvania. Quaere. Compare Pa. Stat. Ann. § 1261 with § 1263.

Of the nineteen states listed above, the following appear to limit admission to the special facilities to persons convicted of or charged with a crime:

South Carolina. Code of Laws of S. Car. § 32-927.

Washington. Wash. Rev. Code § 10-76-060. Cf. § 71-02-480.

Wyoming. Wyo. Stat. Ann. § 25-44.

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[3] Although time prevented tabulation, it appears that most—if not all—states require a court order to transfer an inmate of a prison to a mental institution, criminal or otherwise. See, *e.g.*, N. Y. Correction Law, § 408.